

INDEX

	Page
Opinion below.....	1
Jurisdiction.....	1
Question presented.....	2
Statutes involved.....	2
Statement.....	6
Reasons for granting the writ.....	9
Conclusion.....	13
Appendix.....	15

CITATIONS

Cases:

<i>DeMasters v. Arend</i> , 313 F. 2d 79, petition for certiorari dismissed, 375 U.S. 936.....	11
<i>Foster v. United States</i> , 265 F. 2d 183, certiorari denied, 360 U.S. 912.....	8, 9, 10, 11
<i>Globe Construction Co. v. Humphrey</i> , 229 F. 2d 148.....	11
<i>Lash v. Nighosian</i> , 273 F. 2d 185, certiorari denied, 362 U.S. 904.....	11
<i>McDermott v. John Baumgarth Co.</i> , 286 F. 2d 864.....	11
<i>O'Connor v. O'Connell</i> , 253 F. 2d 365.....	11
<i>United States v. Ryan</i> , 320 F. 2d 500, certiorari granted February 17, 1964, No. 590, this term.....	10, 11

Statutes:

Internal Revenue Code of 1954:

	Page
Sec. 6501(c) (26 U.S.C. 1958 ed., Sec. 6501(c))-----	2
Sec. 7601 (26 U.S.C. 1958 ed., Sec. 7601) ..	2
Sec. 7602 (26 U.S.C. 1958 ed., Sec. 7602) ..	3
Sec. 7604(a)(b) (26 U.S.C. 1958 ed., Sec. 7604(a)(b))-----	4, 7, 8
Sec. 7605(a)(b) (26 U.S.C. 1958 ed., Sec. 7605(a)(b))-----	5, 8

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. —

UNITED STATES OF AMERICA AND ERNEST J. TIBERINO,
JR., SPECIAL AGENT, INTERNAL REVENUE SERVICE,
PETITIONERS

v.

MAX POWELL AND WILLIAM PENN LAUNDRY, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The Solicitor General, on behalf of the United States and Ernest J. Tiberino, Jr., Special Agent, Internal Revenue Service, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit reversing an order of the district court which directed respondent Powell to comply with an Internal Revenue summons.

OPINION BELOW

The opinion of the court of appeals (Appendix, *infra*, pp. 15-20) is reported at 325 F. 2d 914.

JURISDICTION

The judgment of the court of appeals (App. *infra*, p. 21) was entered on December 23, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

QUESTION PRESENTED

Whether the Internal Revenue Service, in order to enforce a summons for the production of books and records relating to closed tax years as to which additional taxes may be assessed only in case of fraud, is required to show probable cause for believing that there is fraud.

STATUTES INVOLVED

Internal Revenue Code of 1954:

SEC. 6501. LIMITATIONS ON ASSESSMENT AND COLLECTION.

* * * * *

(e) *Exceptions.*—

(1) *False return.*—In the case of a false or fraudulent return with the intent to evade tax, the tax may be assessed, or a proceeding in court for collection of such tax may be begun without assessment, at any time.

(2) *Willful attempt to evade tax.*—In case of a willful attempt in any manner to defeat or evade tax imposed by this title (other than tax imposed by subtitle A or B), the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time.

* * * * *

(26 U.S.C. 6501.)

SEC. 7601. CANVASS OF DISTRICTS FOR TAXABLE PERSONS AND OBJECTS.

(a) *General Rule.*—The Secretary or his delegate shall, to the extent he deems it practicable, cause officers or employees of the Treas-

ury Department to proceed, from time to time, through each internal revenue district and inquire after and concerning all persons therein who may be liable to pay any internal revenue tax, and all persons owning or having the care and management of any objects with respect to which any tax is imposed.

* * * * *

(26 U.S.C. 7601.)

SEC. 7602. EXAMINATION OF BOOKS AND WITNESSES.

For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary or his delegate is authorized—

(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;

(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary or his delegate may deem proper, to appear before the Secretary or his delegate at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under

oath, as may be relevant or material to such inquiry; and

(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.

(26 U.S.C. 7602.)

SEC. 7604. [As amended by Sec. 4(i), Act of April 2, 1956, c. 160, 70 Stat. 87 and Sec. 208 (d)(4), Highway Revenue Act of 1956, c. 462, 70 Stat. 374]. ENFORCEMENT OF SUMMONS.

(a) *Jurisdiction of District Court.*—If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, records, or other data, the United States district court for the district in which such person resides, or is found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, records, or other data.

(b) *Enforcement.*—Whenever any person summoned under section 6420(e)(2), 6421(f)(2), or 7602 neglects or refuses to obey such summons, or to produce books, papers, records, or other data, or to give testimony, as required, the Secretary or his delegate may apply to the judge of the district court or to a United States commissioner for the district within which the person so summoned resides or is found for an attachment against him as for a contempt. It shall be the duty of the judge or commissioner to hear the application, and, if satisfactory proof is made, to issue an attachment, directed to some proper officer, for the arrest of such person, and upon his being brought before him to proceed to a hearing of the case; and upon such hearing the judge or

the United States commissioner shall have power to make such order as he shall deem proper, not inconsistent with the law for the punishment of contempts, to enforce obedience to the requirements of the summons and to punish such person for his default or disobedience.

(26 U.S.C. 7604.)

SEC. 7605. [As amended by Sec. 4(i), Act of April 2, 1956, c. 160, 70 Stat. 87 and Sec. 208 (d)(4), Highway Revenue Act of 1956, c. 462, 70 Stat. 374]. **TIME AND PLACE OF EXAMINATION.**

(a) *Time and Place.*—The time and place of examination pursuant to the provisions of section 6420(e)(2), 6421(f)(2), or 7602 shall be such time and place as may be fixed by the Secretary or his delegate and as are reasonable under the circumstances. In the case of a summons under authority of paragraph (2) of section 7602, or under the corresponding authority of section 6420(e)(2) or 6421(f)(2), the date fixed for appearance before the Secretary or his delegate shall not be less than 10 days from the date of the summons.

(b) *Restrictions on Examination of Taxpayer.*—No taxpayer shall be subjected to unnecessary examination or investigations, and only one inspection of a taxpayer's books of account shall be made for each taxable year unless the taxpayer requests otherwise or unless the Secretary or his delegate, after investigation, notifies the taxpayer in writing that an additional inspection is necessary.

(26 U.S.C. 7605.)

STATEMENT

On March 12, 1963, the Internal Revenue Service issued a summons directing respondent Powell, the president of respondent William Penn Laundry, Inc. ("the taxpayer"), to appear before petitioner Tiberino, a Special Agent of the Service, and to give testimony and produce specified books and records of the taxpayer relating to the latter's tax liability for the fiscal years ending July 31, 1958 and 1959 (R. 10a-11a).¹ Powell appeared before Tiberino, but upon advice of counsel declined to produce the records (R. 14a-16a). He contended that since the statute of limitations barred assessment of any additional taxes for those years except in case of fraud, and that since those years had been previously examined, "unless the taxpayer was given some indication or showing of fraud, the law does not permit an examination of the records for these two barred years" (R. 16a-17a). He told Agent Tiberino that "If you would be willing to give us some indication of the allegation here or justification for opening such closed years, we would be willing to consider or reconsider our position" (R. 17a). Tiberino replied that "in view of the position taken today, there is no point in carrying this meeting any further at this time" (*ibid.*).

On May 20, 1963, the government instituted a proceeding in the District Court for the Eastern District

¹ "R" refers to the appellant's appendix in the court of appeals, which has been filed with the Clerk.

Prior to the issuance of the summons, the Regional Commissioner of the Service had informed the taxpayer by letter that, "in order properly to verify its returns for those years," a reexamination of its books and records would be made (R. 9a).

of Pennsylvania, pursuant to Section 7604(b) of the Internal Revenue Code of 1954, to enforce the summons (R. 1a, 3a-5a). Attached to the petition for enforcement was an affidavit by Tiberino stating that since February, 1963, he had been investigating the correctness of taxpayer's income tax returns for 1958 and 1959; that on the basis of information obtained in the investigation "he has reason to suspect" that the taxpayer filed false and fraudulent returns for those years with intent to evade its taxes and had attempted to evade such taxes for those years "by overstating the amount of purchases made which in turn were used as expenses so as to fraudulently understate the amount of taxable income" for those years; and that, "based upon the above investigation," the Regional Commissioner of the Internal Revenue Service "determined that an additional examination" of the taxpayer's books and records for those years "was necessary" (R. 7a-8a).

In response to the petition, the respondents reiterated their argument that since the assessment of any additional tax for those years was barred by the statute of limitations unless there was fraud, the government was not entitled to examine the books and records for those years unless it offered "some justification for attempting to open the closed years in question," and that although Agent Tiberino had been requested to give some justification, he had declined to do so (R. 22a-24a).

After hearing argument, the district court held that the allegation in Tiberino's affidavit that the

taxpayer had overstated the amount of its purchases which were treated as expenses was sufficient to warrant a further investigation (R. 40a-41a) and, with certain limitations not here pertinent, enforced the summons (R. 45a).

The court of appeals reversed. It held that, in view of the prohibition in Section 7605(b) of the Code against subjecting taxpayers to "unnecessary examination or investigations," a reexamination of a taxpayer's records for years as to which the assessment of additional taxes is barred by the statute of limitations except in case of fraud "must be 'unnecessary' within the meaning of section 7605(b) unless something has been discovered by the Secretary's delegate which might cause a reasonable man to suspect that there has been fraud in the return for the otherwise closed year" (App. *infra*, p. 18). Rejecting the view of the Second Circuit in *Foster v. United States*, 265 F. 2d 183, certiorari denied, 360 U.S. 912, that the government need not establish probable cause that the taxpayer had committed fraud during the closed years, the court stated (*id.*, pp. 18-19) that the requirement in Section 7604(b) of the Code that there be

a "hearing" on the application to enforce the administrative summons at which "satisfactory proof" shall be made * * * means that the court shall decide on the basis of the showing made in the normal course of an adversary proceeding whether the agent's suspicion of fraud is reasonable. * * * This the court cannot do unless the agent discloses whatever may have created his suspicion. Since the agent in this

case failed to make such disclosure, despite the taxpayer's formal request for it, his application for judicial assistance should have been denied [footnote omitted].

REASONS FOR GRANTING THE WRIT

1. The holding of the court below that the Internal Revenue Service cannot enforce a summons for the production of records relating to closed taxable years unless it establishes that the "agent's suspicion of fraud is reasonable" i. e., as the court itself recognized, in direct conflict with *Foster v. United States*, 265 F. 2d 183 (C.A. 2), certiorari denied, 360 U.S. 912. In *Foster* the Second Circuit affirmed a district court order enforcing such a summons, which rested upon an agent's affidavit which did not even state (unlike the affidavit in the present case) that he had "reason to suspect" tax evasion for the closed years. The affidavit in *Foster* stated only that the records sought were "required to authenticate" certain claims of the taxpayer (265 F. 2d at 186). The court held (pp. 186-187) that since the allegations in the affidavit "showed that the inspection sought was in aid of an investigation properly authorized by Congress by § 7602 of the Internal Revenue Code of 1954" and that "the records sought were material and relevant to the investigation," the enforcement order was proper; "an affirmative showing of probable cause for the administrative inquiry is not required. * * * [T]he Commissioner, as a condition to the issuance of a summons and order under §§ 7602 and 7604, should not be required to prove grounds for belief that [because of fraud] the liability was not time-barred 'prior to ex-

amination of the only records which provide the ultimate proof.”

The decision below also conflicts with *United States v. Ryan*, 320 F. 2d 500 (C.A. 6), certiorari granted, February 17, 1964, No. 590, this Term. In *Ryan* the court of appeals, in affirming the district court's enforcement order, rejected the taxpayer's contention (320 F. 2d at 501) that “to entitle the government to enforcement of summons with respect to the barred years, it ‘must establish to the satisfaction of the District Court that a reasonable basis exists for his suspicion of fraud or that probable cause exists to believe the taxpayer was guilty of fraud.’” The court pointed out (p. 502) that the Code “confer[s] broad investigative powers on the Secretary to aid him in the performance of his statutory duties and provide[s] a summary procedure in court to enforce compliance with the summons. Nowhere has Congress required the Secretary to establish, as a condition precedent to the exercise of his right to investigate, that he have a reasonable basis therefor or probable cause to suspect criminality.” The court cited *Foster, supra*, as a case “not requiring the establishment of probable cause as a condition precedent to a tax investigation” (p. 503).

By granting certiorari in *Ryan*,² this Court recognized the need for resolution of the conflict among

² Although the government originally had opposed review in *Ryan*, it withdrew its opposition as a result of the decision in the present case. See the Brief in Opposition and the Supplemental Memorandum, No. 590, this Term.

the circuits² over this important question in the administration of the revenue laws. In deciding the issue, the Court should also have the present case before it. In *Ryan* the agent testified as to his reasons for concluding that the investigation was necessary (320 F. 2d at 501), and the court of appeals ruled (p. 502) that "the District Court was justified in concluding from the testimony of the Internal Revenue Agent that he ought not to disturb the determination made by the Secretary that the investigation was necessary." This Court might hold in *Ryan* that the agent's testimony fully established the need for the investigation, and therefore find it unnecessary to decide the broader underlying issue whether, in order to enforce a summons relating to closed tax years, the government must show probable cause that the taxpayer committed fraud. In the present case, on the other hand, the court of appeals ruled that the agent's failure to disclose "whatever may have created his suspicion" barred enforcement of the summons (App., *infra*, p. 19). This ruling squarely presents the basic issue whether, as the government contends and as the court of appeals ruled in *Ryan* (320 F. 2d at 502), the district court's function is limited to

²The First Circuit is in accord with the court below that the government is required to prove probable cause. *O'Connor v. O'Connell*, 253 F. 2d 365, 370; *Lash v. Nighosian*, 273 F. 2d 185, certiorari denied, 362 U.S. 904. In addition to the Second (*Poster*) and Sixth (*Ryan*) Circuits, three other circuits also have rejected the probable cause requirement. *Globe Construction Co. v. Humphrey*, 229 F. 2d 148 (C.A. 5); *McDermott v. John Baumgarth Co.*, 286 F. 2d 864, 867 (C.A. 7); *DeMasters v. Arend*, 313 F. 2d 79 (C.A. 9), petition for certiorari dismissed, 375 U.S. 936.

determining "whether the investigation is being made in good faith for one of the purposes authorized by the statute or to reliev[ing] against oppressive procedures." The reasons why we believe that a showing of good cause is not required are set forth at pages 5 to 7 of our brief in opposition in *Ryan* (see note 2, *supra*, p. 10), to which we refer the Court.

2. Even if, contrary to our view, the government is required to show good cause for suspecting that the taxpayer committed fraud, a sufficient showing was made here. The agent stated in his affidavit that, on the basis of "information obtained in" a three-month investigation of the taxpayer's corporate income tax returns for the fiscal years 1958 and 1959, he had reason to suspect that the corporation "has attempted to evade and defeat the taxes due for these years by overstating the amount of purchases made which in turn were used as expenses so as to fraudulently understate the amount of taxable income for the above fiscal years" (R. 7a-8a). The taxpayer's suspected overstatement of its purchases, with its consequent inflation of deductible business expenses, was plainly sufficient to justify examination of the taxpayer's books and records for the years in which the alleged overstatement occurred. The agent was not required to state in greater detail the reasons for his conclusion that a further investigation of the taxpayer was appropriate. Any concern about protecting this taxpayer from harassment by an "unnecessary" investigation is thus dissipated by the agent's affidavit, and the district court was fully warranted in enforcing the summons.

CONCLUSION

This petition for a writ of certiorari should be granted, and the case should be set for argument following *Ryan v. United States*, No. 590, this Term.

Respectfully submitted.

ARCHIBALD COX,

Solicitor General.

LOUIS F. OBERDORFER,

Assistant Attornel General.

JOSEPH M. HOWARD,

NORMAN SEPENUK,

BURTON BERKLEY,

Attorneys.

MARCH 1964.

APPENDIX

United States Court of Appeals for the Third Circuit

No. 14516

UNITED STATES OF AMERICA AND ERNEST J. TIBERINO,
JR., SPECIAL AGENT, INTERNAL REVENUE SERVICE

v.

MAX POWELL AND WILLIAM PENN LAUNDRY, INC.,
APPELLANTS

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF PENNSYLVANIA

Argued October 17, 1963

Before: McLAUGHLIN, HASTIE and FORMAN,
Circuit Judges.

OPINION OF THE COURT

(Filed December 23, 1963)

By HASTIE, *Circuit Judge.*

The United States and a special agent of the Internal Revenue Service brought this action in the district court, as authorized by section 7604(b) of the 1954 Internal Revenue Code, to compel a corporate

taxpayer, William Penn Laundry, Inc., and its president Max Powell, to obey an administrative summons, issued in March 1963 by special agent Ernest Tiberino, one of the plaintiffs, directing them to appear before him and to produce for reexamination certain records of the corporation for the years 1958 and 1959.

In response to the summons, Powell appeared before Tiberino at a formal hearing and pointed out that the taxpayer's records for 1958 and 1959 had already been examined, that the normal three-year statute of limitations had run against 1958 and 1959 deficiency assessments, that only to redress fraud could those closed years be reopened and that he knew of no basis upon which fraud could be attributed to the taxpayer. He then asked agent Tiberino to indicate some justification for reexamining the records in question and refused to produce them otherwise. Tiberino declined to justify his demand and summarily terminated the hearing. He then instituted this enforcement proceeding.

With this petition Tiberino filed in the district court his affidavit asserting that "on the basis of information obtained" in a current investigation of taxpayer's 1958 and 1959 income tax returns, "he has reason to suspect that the William Penn Laundry, Inc., has filed false and fraudulent corporate income tax returns for its fiscal years ending July 31, 1958 and July 31, 1959, with the intent to evade its taxes and has attempted to evade and defeat the taxes due for these years by overstating the amount of purchases made which in turn were used as expenses so as to fraudulently understate the amount of taxable income for the above fiscal years". Answering the petition, the defendants stated what had occurred at the hearing before agent Tiberino and

again refused to produce the 1958 and 1959 records unless justification for their reexamination should be shown. When the matter came on for hearing, the plaintiffs elected to make no factual showing beyond Tiberino's affidavit. Indeed, Tiberino was not present, appearing only by counsel. After hearing argument, the court ordered the defendants to honor the summons and produce their records for Tiberino's examination. The defendants have appealed from that order.

We first summarize the relevant provisions of the 1954 Internal Revenue Code. Section 7602 confers upon the Secretary of the Treasury or his delegate very broad power to summon witnesses and to require the production of records "as may be relevant or material" to inquiry into tax liability. Section 7605(b) prohibits subjecting a taxpayer "to unnecessary examination or investigations". Section 7604(b) provides that the judge who is asked to enforce an administrative summons shall hear the application and, "if satisfactory proof is made", take coercive action against the person summoned.

On this appeal we must determine in the light of the above cited provisions of the statute what a court's responsibility is when it is asked to enforce an administrative demand to reexamine a taxpayer's records after a return has been filed for the year in question, the taxpayer's supporting records have been examined, the tax has been paid in accordance with the indicated liability, and the normal three-year statute of limitations¹ has run against any further deficiency assessment. In such circumstances, the imposition of any additional liability upon the taxpayer must be predi-

¹ There is no suggestion here that the six-year statute of limitations, applicable to gross understatement of income, may be applicable. 26 U.S.C. § 6501(e)(1).

eated upon fraud. 26 U.S.C. § 6501(c)(1). Logically, therefore, a reexamination of his records must be "unnecessary" within the meaning of section 7605 (b) unless something has been discovered by the Secretary's delegate which might cause a reasonable man to suspect that there has been fraud in the return for the otherwise closed year. *Cf. Farmers' & Mechanics' Nat. Bk. v. United States*, 3d Cir. 1926, 11 F. 2d 348; *In re Andrews' Tax Liability*, D. Md. 1937, 18 F. Supp. 804. Nevertheless, the government insists that the basis of the Treasury agent's suspicion is not a matter of judicial cognizance. Rather, it is argued, the agent is entitled to judicial enforcement of his demand for the taxpayer's records if he merely submits to the court his affidavit asserting in generality that "he has reason to suspect" that there has been fraud in the taxpayer's computation of his tax for the year in question. In the government's view the agent need not even set out in his affidavit the facts which gave him "reason to suspect" fraud, much less establish by testimony in court that his suspicion is reasonably grounded. This also seems to be the view of the Court of Appeals for the Second Circuit. *Foster v. United States*, 2d Cir. 1959, 265 F. 2d 183, cert. denied, 360 U.S. 912.

Rejecting this view, we consider it significant that section 7604(b) requires a "hearing" on the application to enforce the administrative summons at which "satisfactory proof" shall be made. We think this provision means that the court shall decide on the basis of the showing made in the normal course² of

² If facts are alleged in the petition or in a supporting affidavit as the basis of the agent's suspicion and are not denied in a responsive pleading there may be no need to take testimony. Otherwise, the agent must present evidence showing some rational basis for his suspicion.

an adversary proceeding whether the agent's suspicion of fraud is reasonable. *O'Connor v. O'Connell*, 1st Cir. 1958, 253 F. 2d 365, followed in *Lash v. Nighosian*, 1st Cir. 1959, 273 F. 2d 185, *cert. denied*, 1960, 362 U.S. 904; *United States v. Carey*, D. Del. 1963, 218 F. Supp. 298. This the court cannot do unless the agent discloses whatever may have created his suspicion. Since the agent in this case failed to make such disclosure, despite the taxpayer's formal request for it, his application for judicial assistance should have been denied.

Our conclusion is in accord with the ruling of the Court of Appeals for the First Circuit in *O'Connor v. O'Connell*, *supra*, and contrary to the language of the Court of Appeals for the Second Circuit in *Foster v. United States*, *supra*. The government also contends that very recent decisions in the Sixth and Ninth Circuits grant the government relief in cases like this one. We do not read those decisions that way.

United States v. Ryan, 6th Cir. 1963, 320 F. 2d 500, does contain language suggesting that a court, asked to enforce an internal revenue summons, need not inquire into the reasonableness of administrative suspicion of fraud. However, the opinion shows that the petitioning revenue agent testified in the enforcement proceeding and explained the basis of his apprehension concerning fraud. Moreover, the decisive conclusion of the court of appeals was that "the district court was justified in concluding from the testimony of the Internal Revenue Agent that he ought not to disturb the determination made by the Secretary that the investigation was necessary".

The Court of Appeals for the Ninth Circuit dealt with this problem in *De Masters v. Arend*, 1963, 313 F. 2d 79. There again the petitioning agent testified as to the basis of his suspicion. He had found that deposits in the bank account maintained for the tax-

payer's store were substantially greater than the total gross receipts of the business as reported in the taxpayer's income tax return. Moreover, a preliminary computation had indicated an increase in the taxpayer's net worth which far exceeded his reported income. With this testimony before it, the court said that "if it appeared that the decision to investigate * * * [possible fraud] was in fact reached as a matter of rational judgment based on the circumstances of the particular case, then the investigation could not be an 'unnecessary' one prohibited by Section 7605(b), just as the act of issuing an administrative subpoena in such circumstances would not be 'arbitrary' and the subpoena unenforceable." 313 F. 2d at 90. The court concluded that the "showing by the taxpayers in the present case that further assessment was time-barred in the absence of fraud may have been sufficient to require the appellants to go forward with a justification of their inquiry. But this they did, and the showing which they made was sufficient to establish (1) that further investigation was undertaken pursuant to the Commissioner's authority, and (2) that the decision to proceed was not arbitrary." 313 F. 2d at 91. This is essentially the position that we take in this case.*

The judgment will be reversed.

A true Copy:

Teste:

*Clerk of the United States Court of Appeals
for the Third Circuit.*

* Probably the Sixth and Ninth Circuits would sustain administrative judgment as to the need for reexamination of records of closed years upon a less impressive showing of suspicious circumstances than the First Circuit would require. However, this is a matter of quantum of proof which does not concern us here because no showing whatever has been made as to the basis of the special agent's suspicion.

**In the United States Court of Appeals
for the Third Circuit**

No. 14516

**UNITED STATES OF AMERICA AND ERNEST J. TIBERINO,
JR., SPECIAL AGENT, INTERNAL REVENUE SERVICE**

v.

**MAX POWELL AND WILLIAM PENN LAUNDRY, INC.,
APPELLANTS**

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF PENNSYLVANIA**

**Present: McLAUGHLIN, HASTIE and FORMAN,
Circuit Judges.**

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the order of the said District Court filed June 5, 1963 be, and the same is hereby reversed.

ATTEST:

IDA O. CRESKOFF, Clerk.

Received and filed December 23, 1963.

IDA O. CRESKOFF, Clerk.

DECEMBER 23, 1963.